

express terms of this law. And having been thus, by several solemn legislative enactments provided for and declared to be *public wharves, no alteration in their location or form can divest them of their free, open, and public character; or authorize any person or body politic to demand and receive toll for the use of them in any manner whatever; leaving them, however, according to the express terms of the law, "subject to the regulation of the corporation of Baltimore relative to public wharves." 1813, ch. 118; 1817, ch. 71, s. 7. **380**

But even supposing the body politic, in whom the absolute right to this land had been vested, had a right to have levied a toll for the use of any wharf, they themselves might have built upon it; yet the contract of the 10th February, 1794, under which these wharves were actually built by Dugan and McElderry, is totally silent as to tolls of every description. No right is reserved to either of the contracting parties to demand and receive wharfage for the use of them, when made, any more than for the use of the streets which were to be filled up as specified. On the contrary, it is expressly declared, as a part of that contract, "that the said canal, wharves, and streets on each side of the said canal be a common highway, and free for the public use, subject to such regulations as the commissioners and their successors shall from time to time establish." Thus by express and mutual consent dedicating these wharves, when made, to the use of the public, as free and unencumbered by toll as any of the public streets of the city.

Finding no express authority either in the law, or in their contract, to demand and collect tolls; these contending parties endeavor to deduce their claim to wharfage, the one from its ownership of the soil, and an obligation to maintain the wharves thus erected; and the other from his merits, as the builder of this costly and valuable work, and from his obligation to keep it in repair.

This ground, "commonly called Harrison's marsh," upon which the Legislature had provided for the building of a new market-house and the completion of a then existing public wharf, having been thus vested in the City of Baltimore, as a body politic, and in general for the use of the town, was thereby laid open to the public free of toll; and no toll having been given in the grant by which it was so vested, none can be exacted by it from any one who may use either the market-house or the public wharf. For, it is a general rule applicable alike to markets, fairs, wharves, and roads, that where no toll is specially allowed in the grant or law by which they are authorized and laid open, none can be demanded; because toll being a matter of private benefit to the owner of the soil, not necessarily incident to a market, fair, wharf, or road, it cannot be charged in any case unless it be specially